Beyond Discrimination Law:

Combatting Subordination Through Other Laws, Such as Tort Law\*

*Sophia Moreau*

1. ***Introduction***

Many scholars who work at the intersection of philosophy and discrimination law now regard legal prohibitions on disparate impact not merely as a way “to counteract unconscious prejudice and disguised animus” but also as a way to do something more ambitious, to realize a broader goal of distributive justice.[[1]](#endnote-1) For some, this broader goal is to give marginalized social groups –for example, racial or ethnic minorities, Indigenous peoples, women, members of LGBTQ2S+ communities, and persons with disabilities-- access to important opportunities in the face of “bottlenecks.”[[2]](#endnote-2) For others, the relevant distributive goal is to increase the power, authority, and visibility of marginalized social groups across a wide array of social contexts.[[3]](#endnote-3) For still others, what matters is to raise the level of welfare or autonomy of these social groups to some sufficient level.[[4]](#endnote-4) These goals are important in and of themselves. But to many discrimination theorists, they matter also because they are among the background conditions necessary for realizing a society of equals –that is, a society in which every person is treated with dignity and no social group is persistently relegated, across many different social contexts, to a status inferior to that of others.[[5]](#endnote-5)

Given that many discrimination theorists are now concerned with putting in place the background conditions for a society of equals, it is curious that the discipline as a whole has retained its relatively narrow focus on discrimination laws rather than broadening out to consider other areas of law that could help or hinder our search for equality.[[6]](#endnote-6) Most scholars working in this discipline still write almost exclusively about the various legal instruments that are specifically designed to prohibit discrimination, such as discrimination laws in the private sector, constitutional equality rights, and relevant international human rights instruments.[[7]](#endnote-7) It is of course entirely understandable that such a discipline would initially focus entirely on such anti-discrimination measures. Wrongful discrimination and systemic subordination arise from complex social circumstances in which people perceive themselves and others to be divided into different social groups, some of which command greater deference and have greater power than others across many different social contexts. Our discrimination laws have evolved precisely as a shared public response to these circumstances and the differences in social status to which they have given rise. So it seems eminently reasonable, when trying to think philosophically about how discrimination or subordination could be a moral wrong or a serious moral harm, to start by looking at discrimination law.

But, as John Gardner wrote shortly before he died, “Discrimination theory has come of age.”[[8]](#endnote-8) Although even twenty years ago there was little sustained philosophical attention devoted to discrimination, we now have an array of philosophical theories that attempt to explain why discrimination is morally objectionable[[9]](#endnote-9) and a similar array of philosophical theories discussing how best to understand the purpose of discrimination laws in such a way as to see them as coherent and justified bodies of law.[[10]](#endnote-10) It is time for discrimination theorists to give more extensive consideration to the role that other areas of law play in sustaining patterns of subordination and marginalization.

Of course, some of the reasons why discrimination theorists ought now to move away from a central focus on discrimination laws are local and political. Within the United States, for instance, prohibitions on disparate impact have not proven a very effective vehicle for redressing the persistent marginalization of certain social groups. This is partly because, in the absence of constitutional protection for affirmative action programs, any attempt to address disparate impact by singling out certain subordinated social groups for special, ameliorative treatment risks being challenged as disparate treatment of the more privileged individuals whom such programs exclude.[[11]](#endnote-11) Moreover, one of the most important causes of social marginalization is poverty. It almost always underlies disparate impact and helps to explain its severity for marginalized social groups; but it is unlikely ever to be recognized in most jurisdictions as a protected trait.

Yet even in countries such as Canada, which prohibits policies with a disparate impact across a broad range of contexts, which gives constitutional protection to state-initiated affirmative action programs, and which does have pockets of law that recognize poverty (or “la condition sociale”) as a protected trait, it is nevertheless clear that discrimination laws cannot do all or even most of the work that needs to be done if we are to create a society of equals.[[12]](#endnote-12) That is because many other areas of law inadvertently contribute to the unjust marginalization of certain social groups, leaving these groups without significant opportunities, resources, and powers that members of other groups have, across a wide array of social contexts. Of course, when broad prohibitions on discrimination in the private sector were developed Canada and the United States during the civil rights era, debates about their merits often presupposed that other areas of law did not similarly restrict anyone’s freedom. Some scholars were quite vocal in expressing their concern that discrimination laws would be an undue fetter on people’s freedom of association and freedom of contract.[[13]](#endnote-13) But there are countless ways in which other areas of the law set up our choice situations to begin with and silently and invisibly make it possible for empowered groups easily to do certain things while placing significant costs on other groups’ attempts to do those same things.[[14]](#endnote-14) So it is a mistake to think that discrimination laws uniquely limit people’s freedom or that they pit equality against freedom. All laws have the effect of conferring freedoms on some while taking away freedoms from others, and, depending on how they are structured, they can work either to equalize important opportunities and powers or to perpetuate social inequalities.

We know, for instance, that the ways in which we imagine and construct public spaces such as parks, schools, community centres, and government buildings –whether with ramps or with steps, with good lighting or poor lighting, with spaces around the table for wheelchairs or no such spaces-- have a large impact on whether those with physical disabilities are able to participate in the social and political institutions that use these spaces.[[15]](#endnote-15) The same is true of public transit, the accessibility and affordability of which is a condition for so many people’s participation in the workforce and in almost all social activities.[[16]](#endnote-16) We know that that paid parental leave programs can be designed in ways that disadvantage women or that instead also incentivize men to take parental leave, with the result that men become more involved in childrearing throughout their children’s youth and women stay in the workforce in greater numbers.[[17]](#endnote-17) Similarly, the ways in which we design our labour laws and the conception of “the worker” that these laws presuppose can either facilitate marginalized groups’ participation in the workforce or frustrate it.[[18]](#endnote-18) These are only a few examples. But it is clear from them that if our goal is to think about how to create a society of equals, we cannot accomplish this by focussing only on laws that work by prohibiting discriminatory policies by private entities or by governments. We need to think, more broadly, about the impact of many different areas of law on marginalized social groups. We need to consider how to develop legal rules in other areas of law that work to equalize the opportunities, resources, and powers possessed by different social groups, instead of marginalizing some of them.

This paper explores the impact of one other area of law on socially marginalized groups: namely, tort law. I shall lay out some of the different types of rules within tort law that can marginalize various social groups. I shall then, borrowing ideas from discrimination theorists, offer a general characterizationof the different ways in which these types of legal rules can marginalize such socialgroups or perpetuate inequalities. In doing this, my aim is both to elucidate tort law and to offer a model that could be applied to other areas of law as well. As we shall see, these different types of legal rules can be found in any area of law, and the different ways in which these rules work to marginalize certain social groups are also ways in which the rules of other areas of law, too, can work to marginalize such groups. I hope this discussion will therefore be of interest even to those who do not work on tort law but are considering how other areas of law perpetuate social inequalities.

Importantly, it is no part of my project to suggest that simply because a legal rule perpetuates a certain kind of inequality, this fact gives us an overriding reason to advocate for its replacement. It is not the function of every area of law to address every type of injustice; and there are many factors to be considered when advocating for a change in the law. But I do want to urge both that discrimination theorists should think about the effects of other areas of law on marginalized social groups, and that tort theorists who are concerned with the ways in which tort law perpetuates inequalities should engage with the work of discrimination theorists. I shall also suggest that these tort theorists could helpfully investigate how their work dovetails with established theories of tort law such as those provided by formalists, civil recourse theorists, and economists, among others, and that these theories might offer more support than one might think for efforts to eliminate social inequalities.[[19]](#endnote-19)

1. ***Why Tort Law?***

Tort law may seem an odd choice for a place to begin, in expanding our concern for the equal treatment of marginalized social groups beyond discrimination law. At least on some prominent theories of tort law (in particular, “corrective justice” theories, according to which the only legitimate task of judges deciding torts cases is to correct a wrong done by the defendant to the plaintiff), tort law may seem to have no business looking into pre-existing inequalities between the groups to which the plaintiff and the defendant belong. If certain rules of tort law happen to exacerbate these inequalities, then that may seem, on such theories, to be irrelevant from the standpoint of tort law’s own aims and ambitions.[[20]](#endnote-20) As for instrumental theories of tort law, although they are not in principle against using tort law as a tool to eliminate social inequalities, some of the most prominent instrumental theories --economic approaches to tort law-- valorize certain forms of economic efficiency.[[21]](#endnote-21) It is unclear whether the legal rules that promote economically efficient behaviour, on any conception of what it involves, will always or even often work to the benefit of the most marginalized social groups.

I shall be arguing in this paper, however, that we need to distinguish between different waysin which a given legal rule can contribute to the marginalization of certain social groups. I shall try to show that, that once we make these distinctions, we can see that whether tort law should address social inequalities is not an all-or-nothing question with an all-or-nothing answer. Rather, it depends both on the particular way in which a given rule contributes to the marginalization of a certain social group and on the particular theory of tort law in light of which we are interpreting tort law. Different theories of tort law have different implications about which of these ways of contributing to the marginalization of a given social group are problematic, and about which sorts of public officials can legitimately work to rectify them. But importantly, no theory of tort law implies that such inequalities are never tort law’s business.

There is also a further reason why tort law is a helpful area on which to focus, when branching out from discrimination law. Many tort scholars are already in the process of investigating, in quite sophisticated ways, what might under a broad umbrella be called “ways in which the rules of tort law perpetuate social inequalities.” But, although such torts scholars –including pioneers such as Martha Chamallas, Jennifer Wriggins, and Anita Allen--- have often engaged deeply with critical race theory, feminist theory, queer theory, and disability theory, they have not engaged with the philosophical work on equality done by discrimination theorists and have not yet developed a shared set of classifications that all could use to discuss the various kinds of impact on equality that particular rules of tort law have.[[22]](#endnote-22) For example, torts scholars in Canada, the US and the UK have focussed on the standard of the reasonable person in negligence law and have revealed ways in which common interpretations of this standard exclude the perspectives and the needs of various social groups. But they have tended to see their work as contributions to feminist theory, queer theory, and disability theory, respectively, rather than as instantiating a broadly shared understanding of the kinds of equality that we ought to aim for.[[23]](#endnote-23) To take another example, American tort scholars have critiqued the practice of calculating wrongful death damage awards using race- and gender-based statistics about wages and work-life expectancy, and have given quite nuanced analyses of the many ways in which such this practice both devalues the lives and work of women and racial minorities and also provides a perverse incentive for defendants to locate risky or toxic activities in low-income neighbourhoods, thereby increasing the disadvantages faced by such social groups. [[24]](#endnote-24) Relatedly, in Canada, scholars have criticized Canadian courts for their assessment of damages in residential schools litigation, arguing that their assessments “revictimize the plaintiff for being an Aboriginal person.”[[25]](#endnote-25) But these Canadians and these Americans have not engaged with each other, nor has either group looked to philosophical work on discrimination for a general conception of the particular kinds of unequal treatment that they are concerned with. Precisely because some very important work in these areas has already been done by torts theorists, but has not yet been brought together or analyzed in light of recent philosophical work on equality and discrimination, tort law seems a helpful place to start. [[26]](#endnote-26) Examining the work of tort theorists and trying to develop a general classification of the different problems of inequality that they have identified might enable us to see the apparently disparate problems faced by different interest groups as versions of a single set of problems.

So let us turn now to the different types of legal rules in tort law that have perpetuated the marginalization of certain social groups and the different ways in which they have done so. In the next section of the paper, Section 3, I shall present a number of these rules, grouping them into several types. In Section 4, using ideas borrowed from philosophical work in discrimination theory, I shall offer what I think is a helpful general classification of the ways in which such legal rules marginalize certain social groups.

As I emphasized earlier, my paper does not presuppose the simplistic view that whenever a legal rule has the effect of perpetuating the marginalization of some social group, this provides an overriding reason to alter the rule. On the contrary, different theories of tort law have different implications about when we should worry about such effects and when courts and legislatures can legitimately alter the relevant rules of tort law in the face of such effects. I shall begin to explore some of these implications in Section 5. I shall suggest there that many theories of tort law leave more room than one might at first suppose for using tort law as an instrument to rectify at least some unjust social inequalities. Finally, in Section 6 of the paper, I shall discuss what else we can gain from a general classification of the ways in which the rules of tort law perpetuate social inequalities.

1. ***Types of Legal Rules that Marginalize***

We can divide the legal rules within tort law that have perpetuated the marginalization of social groups into several broad types. In this section of the paper, I shall offer some examples of each type of rule. My aim here is not to be comprehensive but simply to present a few noteworthy examples of rules of each type and to explain how they work to marginalize particular social groups.

1. **Gate-keeping rules**

We can start with gate-keeping rules --doctrines that determine, within a given jurisdiction, who has the standing to bring a tort claim of a certain sort, who they can in principle sue, and which jurisdiction’s laws apply to them. For instance, within nuisance law one must, in most jurisdictions, have a certain kind of proprietary interest in the property affected by the nuisance in order to bring a claim. Hence, the owner of that property can sue in nuisance law, and so can a lessee, but homeless friends or family who are temporarily staying with them generally cannot, because they lack the relevant proprietary interest.[[27]](#endnote-27) This is a gate-keeping rule for plaintiffs which, though not deliberately designed to leave those without ownership or rental rights dependent on those who do have these rights, nevertheless functions to do this.

The doctrine of qualified immunity in the United States is another example of a gate-keeping rule that perpetuates the marginalization of certain social groups. It applies to prospective defendants, and it too disadvantages an already marginalized social group: in this case, Black persons. Under the doctrine of qualified immunity, public officials, including police officers who have responded with excessive force, cannot be sued unless a court in some previous case involving nearly identical circumstances has ruled that this behaviour was unconstitutional.[[28]](#endnote-28) The doctrine came under considerable scrutiny after the killing of George Floyd, as one of a number of doctrines that hinders the accountability of public officials for violence against Black persons. But although some states, such as New York state, have since created new civil causes of action against excessive police force and have banned the use of qualified immunity as a defence in these lawsuits, the federal government’s attempt to abolish the defence of qualified immunity through the *George Floyd Justice in Policing Act* stalled at the Senate.

While these two examples of gate-keeping rules are both common law rules, other gate-keeping rules are statutory. One particularly important group of statutory gatekeeping rules are the rules governing limitation periods, which stipulate the periods of time within which lawsuits of particular types in a given jurisdiction must be commenced. Such rules serve the valuable purpose of protecting defendants from the possibility of being indefinitely open to a lawsuit. And the rules look quite neutral, as they apply to everyone. Nevertheless, they can leave vulnerable, disempowered groups unable to pursue or to recover from otherwise valid legal claims; and, as we will see later in our analysis of some of the Canadian residential schools litigation, limitation rules can also interact with other legal rules in ways that compound the injustices suffered by marginalized social groups.

Another set of rules that are helpfully regarded as “gate-keeping” rules are the rules that govern which country’s laws must be applied in transnational torts cases. Sometimes these rules, too, can exacerbate social inequalities. In a recent negligence case in Canada, an appellate court directly considered whether the fact that local laws would perpetuate the unequal status of women plaintiffs provided the court with a sufficient reason to not to apply local laws and to substitute Canadian tort law instead.[[29]](#endnote-29) The case concerned the collapse of a factory in Bangladesh operated by a Canadian company, which killed 1,130 people. The plaintiffs argued that Canadian tort law should be applied rather than Bangladeshi law, because Bangladeshi law includes Sharia law and Sharia law does not distribute damages equally between male and female heirs of the deceased. The Ontario Court of Appeal upheld the decision of the Superior Court judge that, because the unequal provisions of Sharia law were relevant only at the stage of assessing damages, because they would affect only a very small number of plaintiffs, and because a court could opt to sever these provisions when calculating damages for these plaintiffs, there was no sufficiently weighty public policy reason to make an exception to the general principle that the law to be applied is the *lex loci delecti,* the law of the place where the tort occurred. But the court did not rule out the possibility that in a future case, a rule that perpetuated an inequality at the stage of assessing the merits of the plaintiff’s case and that could *not* be severed might give a court reason to apply Canadian tort law instead.

1. **Framing rules**

A second broad class of legal rules that contribute to the marginalization of certain social groups are what we can call “framing rules.” Framing rules determine what, in a given jurisdiction, counts as a legally cognizable cause of action –for instance, in tort law, which harms count as torts in a given jurisdiction.

These rules can perpetuate significant social inequalities. Sometimes, harms that are much more likely to befall members of certain minority groups do not fit neatly inside the box of a legally cognizable tort, because members of this group have not had the political or legal influence to be able to get this particular type of harm recognized as a tort. Domestic violence is a good example of a harm that falls through the cracks in many jurisdictions and that is disproportionately suffered by women, by members of LGBTQ+ communities, and particularly by racialized women and racialized members of LGBTQ+ communities. Many jurisdictions do not have a specific tort of domestic or family violence.[[30]](#endnote-30) Although some of the harms sustained by victims of domestic violence fit into the recognized torts of assault and battery, the harm done by domestic violence extends far beyond isolated incidents of assault and battery: it is a cumulative harm, stemming from complex patterns of coercion and control, and it involves deep and prolonged psychological abuse as well as ongoing physical harm.[[31]](#endnote-31) Moreover, in many jurisdictions, the relevant divorce laws provide no avenue for compensation. All Canadian provinces and many US states do not consider family violence when calculating awards of spousal support.[[32]](#endnote-32) And although victims of family violence can seek recourse through the criminal law, this avenue leaves them without civil remedies. For all these reasons, a lower court judge in Ontario just this year recognized a new tort of “family violence.”[[33]](#endnote-33)

A related problem of framing rules leaving out harms that are more often sustained by marginalized social groups occurs when courts explicitlyrefuse to recognize a certain harm as a tort, deciding that this harm is best remedied elsewhere in the law. Sometimes, the remedies offered elsewhere do not adequately compensate victims; so the marginalized social groups that more often suffer from these harms are left without adequate redress. For instance, in Canada, attempts to create a tort of discrimination have been blocked by the Supreme Court. In *Seneca College v Bhadauria,* the Supreme Court held that the existence of a provincial human rights codes that addressed complaints of discrimination “excludes any common law action based on an invocation of the public policy expressed in the code”.[[34]](#endnote-34) At the time, the relevant Human Rights Code did not in fact guarantee claimants a hearing: their complaints were brought forward to the Tribunal only if they were deemed to have a sufficient “public interest” dimension to them, and if they did not, they were dismissed.[[35]](#endnote-35) So in spite of the Court’s assertions that there was an alternative means available to the plaintiff to have her claim heard and addressed, the reality in practice was that the failure to recognize discrimination as a tort contributed to the ongoing subordination of those groups that need most often to bring claims of discrimination.[[36]](#endnote-36)

1. **Building block rules**

Once a plaintiff brings a particular tort claim using the tort laws of a given jurisdiction, they are subject to the rules that structure that particular tort in that jurisdiction. These rules we can call “building block rules,” since they form the building blocks of particular torts. Much of the work that has been done by torts scholars recently on the adverse impact of tort law on marginalized social groups has focussed on building block rules and the ways in which such rules entrench false and often negative stereotypes about these groups, overlook their interests or needs, and make it more difficult for them to recover (or to recover as much money as members of more privileged groups would).

One quite basic building block rule within negligence law is the objective standard, which is applied both to defendants and to plaintiffs. The defendant is deemed to have acted negligently only if she did not do what “the reasonable person” in their position would have done. Under the doctrine of contributory negligence (or its more plaintiff-friendly version, the doctrine of comparative negligence), a plaintiff can have their damages reduced if the defendant shows that the plaintiff did not take sufficient care for her own safety. Although the objective standard is presented within negligence law as neutral and impartial --a standard that we would all deem reasonable, regardless of our particular values or circumstances, and that we can all fairly be held to-- nevertheless, tort law scholars have criticized the application of the standard in many cases as reflecting only the perspectives and interests of empowered social groups.

For instance, early feminist work on the objective standard argued that judges more often assessed what a reasonable defendant would do in light of “male” ideas about efficiency, rather than “female” ideas about caring and consideration.[[37]](#endnote-37) Most scholars have now moved away from this particular critique on the grounds that it relies on problematic, gendered assumptions about how men and women reason. But there is still a concern that, in spite of the standard appearing impartial, courts may deem certain risky behaviour “reasonable” in boys or men but not in girls or women who behave in those same ways.[[38]](#endnote-38) In a similar vein, scholars writing about whether victims of conversion therapy can successfully sue their therapists in negligence law have noted that whether a judge rules that a given therapist acted “reasonably” in recommending conversion therapy will likely depend on whether the judge accepts the “status-based judgement of contempt or disdain for non-heterosexual identities” that underlies such therapy.[[39]](#endnote-39) Moreover, they note that those therapists who hold themselves out not as medical professionals but as faith-based healers will be held to a lower standard of care, one that reflects what is viewed as reasonable within their own community of faith-based healers. Given that such communities normally view non-heterosexual identities as a sign of illness or immorality, this interpretation of the reasonable person standard turns it into a very partial standard, and one that reinforces negative stereotypes about LTBGQ+ identities. Finally, disability theorists have charted the ways in which, prior to the relatively recent enactment of statutes protecting people with disabilities, some American courts assumed that the reasonable plaintiff with a disability would always travel with an assistive device or companion –a guide dog, a sighted friend, a wheelchair. The result was that plaintiffs with disabilities who ventured out in public on their own without such assistance were sometimes held contributorily negligent.[[40]](#endnote-40) Indeed, one judge found a man who was blind to have been contributorily negligent *even when* he was using a guide dog, because he "failed to put forth a greaterdegree of effort than one not acting under any disabilities to attain due care for his safety”; somewhat ironically, the same judge went on to refer to this as “a standard of care which the law has established for everybody.”[[41]](#endnote-41)

A different set of building block rules that torts scholars have critiqued as contributing to the marginalization of certain social groups are the rules that govern recovery for psychiatric harm in negligence law, when that harm is unaccompanied by a separate physical injury. Although the complete barriers to recovery for psychiatric harm that used to exist in tort law have been eliminated in most jurisdictions, there are still framing rules in place in many jurisdictions that make it more difficult for plaintiffs to recover for these injuries than for physical injuries. For instance, although the Canadian Supreme Court recently held that plaintiffs no longer need to prove that they suffer from a recognized a psychiatric illness,[[42]](#endnote-42) and although the Court explicitly noted that “the distinction between physical and mental injury is elusive and arguably artificial,”[[43]](#endnote-43) the Court nevertheless kept in place the requirement that psychiatric injuries be “serious and prolonged” and that they be the kind of injury that would be sustained in “a person of ordinary fortitude.”[[44]](#endnote-44) Physical injuries do not have to clear either of these thresholds in order to be compensable. This both directly disadvantages plaintiffs with mental illnesses and also contributes to the marginalization of those with mental illness as a group, insofar as it lends official support to the stereotypical idea that mental illnesses are more easily fabricated and exaggerated than physical ones.

A third set of building block rules that have been critiqued by torts scholars as contributing to social inequality are the rules surrounding the privacy tort of “public disclosure of private facts.” Although this tort has been used quite successfully in some jurisdictions to protect women from cyber-harrassment,[[45]](#endnote-45) it has at the same time been developed in ways that make it difficult for members of LGBTQ+ communities to “selectively disclose” their sexual orientation or their gender identity –that is, to disclose it in certain contexts, while keeping it private in others. As Anita Allen has explained, courts tend to take a “once out, always out” point of view on LGBTQ+ identities: they often fail to recognize that one’s sexual orientation or gender identity can still count in some contexts as a “private fact” (for instance, in relation to one’s parents or co-workers) even if one has chosen to disclose it in other contexts (for instance, at an intimate gathering of friends or at a large anonymous social event).[[46]](#endnote-46) Courts have also denied in some cases that the publication of someone’s sexual orientation or identity is “highly offensive,” on the grounds that society as a whole now celebrates LGBTQ+ identities.[[47]](#endnote-47) So the building block rules that define this privacy tort –the rule that the defendant must have disclosed a “private fact” and the rule that the publication of this fact must be “highly offensive”-- have been interpreted by judges in ways that do not accurately reflect the perspective of LGBTQ+ members and that feed into certain stereotypes about these groups, such as that they are now fully accepted within our societies and that they therefore really have nothing to complain about and no reason to conceal their identities.

1. **Remedy-governing rules**

Even if a plaintiff has cleared the relevant gate-keeping rules, framing rules and building-block rules, both they and the social group to which they belong may nevertheless be disadvantaged by the rules that govern remedies. Two types of remedy-governing rules in tort law, in particular, have been critiqued by torts scholars as contributing to the marginalization of particular social groups: (i) the practice of basing wrongful death damage awards on gender- and race-based statistics on wages and work-life expectancy and (ii) the practice of measuring what a plaintiff who has developed a disability has lost by looking to the impairment itself, rather than to her environment and the absence of various supports for her within it.

With respect to gender- and race- based statistics on wages and work-life expectancy, American torts scholars have given nuanced analyses of the ways in which the history of exclusion and devaluation of women and racial minorities in the workforce has resulted in lower wages for these groups, as well as lower work-life expectancy.[[48]](#endnote-48) As they have noted, the practice of estimating a plaintiff’s lost wages or lost years of work-life based on these lower figures then compounds the unfairness suffered by members of these groups, partly because it penalizes them for being victims of prior injustices, and partly because it creates perverse incentives for employers to locate particularly risky enterprises (for instance, oil refineries or facilities for storing or transporting toxic chemicals) in low-income neighbourhoods and thereby continuing to place these risks on the shoulders of those whom it will be cheaper for them to compensate should the risks materialize into harms.

A related set of concerns has arisen in Canada in cases involving abuse in government- and church-sponsored residential schools. In such cases, courts have often assessed the plaintiff’s damages for lost future earnings by considering the occupations of the plaintiffs’ siblings, on the assumption that if all or many of the plaintiffs’ siblings held only a particular low-paying, relatively unskilled job, it is unlikely that the plaintiff himself would have been able to hold down a better job, even if he had not been abused. For instance, in *Blackwater v. Plint,* the trial judge gave considerable weight to the fact that both of his brothers were loggers.[[49]](#endnote-49) But of course, this was the occupation of his brothers in large part because systemic discrimination against Indigenous peoples had left them both without an adequate education and living in a remote area with few employment opportunities.

Disability theorists have also looked at the ways in which remedy-regulating rules perpetuate stereotypes about disabilities. Sometimes, courts assume that the appropriate way to measure the plaintiff’s damages is by looking only at the nature and consequences of her new impairment –which fuels the stereotype that disabilities are inherent physical or mental defects in people, rather than being in large part a product of a person’s social context and a reflection of the supports that are available or unavailable to them. Some disability theorists have therefore urged that what plaintiffs who have been rendered disabled really need, to make them whole, is not an amount of money representing the damage that has been done to their bodies and their careers but an amount of money corresponding to what they will need to adapt to their disability in their particular social context.[[50]](#endnote-50)

***4. Ways in Which Such Legal Rules Marginalize Social Groups***

In the previous section, I laid out some different types of legal rules and explored how some rules of each type have worked to perpetuate the unjust marginalization of groups such as women, racial minorities, members of LGBTQ+ communities, and people with disabilities, and women. The analyses that I presented of these different rules were quite particular: they focussed, as torts scholars have done, on the group whose interests were at issue in each case and on the particular aspect of each legal rule that worked to perpetuate their social marginalization. But I think something generalcan helpfully be said about what is going on in these different examples. I think we can use some insights from discrimination theory to identify *four general ways* in which such legal rules work to perpetuate unjust social inequalities. This is of interest in and of itself. But in addition, having this classification will also help us later to assess which of these instances of perpetuating unjust social inequalities ought to concern us on different theories of tort law.

Importantly, the four ways I am about to discuss do not map directly onto the four types of legal rules. Rather, as we shall see, a rule of any type can contribute to the marginalization of social groups any of the four ways listed below. The four ways are also not mutually exclusive: it is perfectly possible for a legal rule to marginalize a given social group in more than one way.

1. **Inherently biased rules**

Some of the legal rules considered above marginalize a certain social group because they are inherently biasedagainst that group. A rule is “inherently biased” against a certain marginalized social group in the sense that is relevant here only if that standard *directs officials to* *treat people from that group in a way that disadvantages them relative to others,* and only if it *thereby devalues these people or their responses.* [[51]](#endnote-51)  So, to count as inherently biased, a legal rule must explicitly single out members of a certain marginalized social group for a certain disadvantageous treatment. And it must also imply that this treatment is appropriate for members of this group because their lives are in some sense worth less than those of others, or their responses, less reasonable, by virtue of being the life or the response of a member of this group.

One of the most obvious inherently biased legal practices is the use of race- and gender- based statistics on wages and work-life expectancy in assessing damages. This practice explicitly treats the race and these gender of certain plaintiffs as a reason for thinking that they would have earned less, or lived less longer, than others, if they had not been injured. The reason this devalues women and racial minorities is *not* that a lower projected earning or a lower work-life expectancy is in and of itself insulting: it is not always. Rather, the practice of assuming that such race- and gender- based statistics will be accurate even in the future *expresses a complacency* about the systemic discrimination that led to these statistics –as though it is just a fixture of some people’s lives, rather than something that others have a responsibility to work to change. In addition, the practice seems to assume that these groups are incapable of rising above their past circumstances, which perpetuates stereotypical assumptions about their alleged lack of initiative and lack of effort (and which in turn can make it seem, erroneously, as though their problems are their own fault).

Another set of rules that are arguably inherently biased are the building block rules requiring that plaintiffs claiming purely psychiatric harm meet a higher bar than plaintiffs alleging some physical injury. These rules explicitly distinguish between plaintiffs suffering from a purely psychiatric injury and plaintiffs suffering also or only from a physical injury; and in requiring that the former prove that their illness was “serious and prolonged” and that it would have arisen in “a person of ordinary fortitude,” these legal rules seem to imply that those with psychiatric injuries or illnesses tend to exaggerate or fabricate their injuries.[[52]](#endnote-52)

1. **Neutral rules, interpreted in a biased way**

Of course, many of the legal rules that marginalize social groups are not inherently biased: they do not, on their face, draw any distinction between these groups and others. Rather, they present themselves as neutral. But sometimes *they are interpreted by judges in ways that privilege the needs or the perspectives of certain empowered groups while mischaracterizing or ignoring the needs of a marginalized social group.* We can call these “neutral standards, interpreted in a biased way.” Such biased interpretations are particularly problematic because, under the guise of neutrality, the legal rules then perpetuate false and negative stereotypes about a particular minority group. In addition, such biased interpretations make it more difficult for members of this group to succeed legally; yet the neutrality of the rule makes it appear as though these difficulties are ones for which these people themselves are responsible.

This seems to be the best way to understand the problems that torts scholars have identified with the objective standard in negligence law. This standard is not inherently biased against any particular social group. On the contrary, it presents itself as an impartial standard, capturing what is reasonable for everyone and what can fairly be asked of everyone alike. But, as we saw in the previous section, sometimes judges have interpreted the objective standard in such a way as to demand that women defendants take more care than would be required of men in similar circumstances; or to demand that plaintiffs with disabilities take more care for their own safety than those without disabilities would have to take; or they have relativized the standard to the beliefs of the community of faith-based healers that the defendant conversion therapist belongs to –which then distorts the standard so that it ends up reflecting a partial and demeaning set of beliefs. Although the objective standard, when interpreted in these ways, is clearly no longer impartial, it still presents itself as such. And consequently, the difficulties this standard then poses for women, people with disabilities, or members of LGBTQ+ communities misleadingly appear to have been their own fault. The person with the guide dog ought to have taken more precautions; the victims of conversion therapy should have known better than to put themselves in this position to begin with.

Another example of a set of rules that are themselves neutral but have been interpreted in a biased way are those that structure the privacy tort of “public disclosure of personal facts.” The rule that the defendant must have disclosed a “private fact” and the rule that the publication of this fact must be “highly offensive” are supposed to apply to anyone, regardless of their sexual orientation or their gender identity. But some judges have deemed facts about non-heterosexual identities “private” only when they have never been disclosed in any social context, and have ruled that the disclosure of these plaintiff’s identities in certain contexts is not “highly offensive” because society now celebrates LTBGTQ+ communities. As Anita Allen has argued, this privileges a certain heterosexual understanding of identity (that one’s identity is always something one can comfortably disclose, in any context). This way of interpreting the building blocks of this privacy tort also perpetuates false stereotypes about members of LGBTQ+ communities, such as the assumption that they do not really face discrimination any longer and are just hypersensitive, complaining when they really have nothing to complain about.

But neutral rules do not need to be inherently biased or interpreted in a biased way in order to contribute to the marginalization of such social groups. There is also a problem of:

1. **Rules that disproportionately disadvantage minorities, in ways that contribute to their unjust subordination**

Sometimes, even if a rule is neutral and is interpreted by judges in a way that does not itself privilege any one group over any other group, *the application of that rule in a particular case nevertheless ends up disproportionately disadvantaging an already marginalized social group, in ways that contribute to their unjust subordination.* That is because we live in societies with deep underlying inequalities. Racial minorities, people with disabilities, and members of LGBTQ+ communities are frequently in vulnerable social positions, across a variety of different social contexts: they own less property than others, they have less power and fewer opportunities than others, more often live in poorer neighbourhoods, and are more likely to be in abusive relationships than others. As a result, even neutral rules of tort law that are neutrally interpreted can end up disproportionately disadvantaging these social groups in ways that contribute to their unjust subordination. I have argued elsewhere that this is one of the reasons why discrimination itself wrongs people: it can work to sustain the unfair subordination of particular social groups.[[53]](#endnote-53)

Some of the framing rules that we considered in Section 3 seem problematic for precisely this reason. Think back, for instance, to the rules that recognize assault and battery as legally cognizable torts, but are silent on the matter of a general tort of domestic violence. And think of the rules that explicitly deny the status of a tort to discrimination. These legal rules are neutral on their face. And they are not applied in a biased way: in jurisdictions that do not recognize domestic violence or discrimination as torts, no plaintiff can bring these tort claims. The problem is that domestic violence and discrimination are, in our societies, overwhelmingly harms suffered by marginalized social groups, groups such as racial minorities, LGBTQ+ individuals, people with disabilities, and women. So the rules that neutrally prevent everybody from bringing a torts claim of domestic violence or discrimination disproportionately disadvantage these already marginalized groups. And importantly, they do not only work to disadvantage them. They disadvantage them *in a way that perpetuates their subordinate status.* For domestic violence and discrimination are among the important, abiding causes of the stigma and social exclusion faced by such social groups.

Some of the gate-keeping rules of tort law that we considered earlier in Section 3 also work in this way. For instance, the rule that one must have a certain kind of property interest in order to bring a claim in nuisance law applies to everyone, and judges are not themselves biased in its application: they deny standing to everyone alike who lacks the relevant kind of property interest. But in societies with a history of “redlining” Black communities or Indigenous communities (declaring the areas in which they predominate too risky for mortgage loans) and with a history of discrimination against these groups in rental housing, even this neutral interpretation of a neutral rule in nuisance law can perpetuate their social subordination. That is because it primarily affects members of thesesocial groups: they are overwhelmingly the people who lack a home, and so are overwhelmingly the people who are unable to bring nuisance claims on their own. This rule ensures that such people lack yet another power, and that there is yet another sense in which they remain reliant on those in whose homes they are staying.

The gate-keeping rule of qualified immunity for police contributes in a similar way to the unfair subordination of Black persons in the United States. Black persons are disproportionately the victims of excessive violence on the part of police –for an array of reasons connected to the United States’ long history of denigration and exclusion of them. So although the rule of qualified immunity bars *everyone* from successfully suing police unless a court in some previous case involving nearly identical circumstances has ruled that this behaviour was unconstitutional, the rule primarily affects Black persons, because they form the majority of victims of excessive police violence. And it works to perpetuate their unjust subordination in American society. It leaves them without legal recourse in such cases. It provides no incentive for police to respond in humane and dignified ways. And it sends the deeply troubling social message that excessive violence towards members of this group is acceptable.

Of course, it is not only neutral rules, neutrally interpreted that can disproportionately disadvantage marginalized social groups in ways that contribute to their subordination. Inherently biased rules can do this as well. Think back to the biased practice of using race- and gender- based statistics about wages and work-life expectancy in assessing damages. It results in lower damage awards for women and members of racial minorities, and torts scholars have documented the fact that it also creates perverse incentives for companies engaging in particularly risky activities (such as the movement or storage of toxic chemicals or manufacturing processes that are especially dangerous) to locate these activities in areas predominantly populated by racial minorities who are paid lower wages and who have a lower life expectancy, so as to minimize damage awards when these risks materialize.[[54]](#endnote-54) So it then contributes to behaviour on the part of others in society that sustains the unjust subordination of these groups.

There is one final way in which the legal rules of tort law seem to perpetuate the marginalization of certain social groups. This involves:

1. **Rules that invite or require officials to treat a fact that depends on a past injustice as a reason for further disadvantaging someone, thereby compounding that prior injustice**

Sometimes, a legal rule invites or requires an official to take a fact that would not have been true of someone had that person not been a victim of a prior injustice, and then treat that fact as a reason for further disadvantaging them. When the official does this, *they allow that past injustice to generate a new form of disadvantage.* This arguably makes the justice system complicitous in the continuation of that injustice. To describe what happens in such cases, we can borrow an idea from the discrimination theorist Deborah Hellman: the legal system ends up “compounding a prior injustice.”[[55]](#endnote-55) I think this is an important further problem with use of race- and gender-based statistics in calculating damages, quite apart from the problems we have examined so far. As torts scholars have documented, the lower salaries and lower life expectancies that these tables are based upon are the product of a history of systemic discrimination against these groups –discrimination in the workplace, discrimination in medical care, and discrimination in society at large. So, when judges use such figures as the basis for lower damage awards to women and members of racial minorities, they are allowing a prior injustice to generate a new disadvantage –ie, a lower damage award—and they thereby become complicitous in the continuation of that injustice.

The idea of compounding a prior injustice also provides a helpful way of explaining the similarity between the unfairness involved in the use of these race- and gender- based statistics in calculating damage awards and the unfairness that Canadian scholars have noted in the practice of basing damages for lost wages in residential schools litigation on the low salaries of plaintiffs’ family members. This Canadian practice is not itself inherently biased against Indigenous peoples: it is a practice used in other torts cases as well. But in residential schools litigation, the plaintiff’s family members’ salaries reflect systemic discrimination.So the legal rule that directs judges to use these facts in calculating the plaintiff’s damage awards compounds that past injustice.

Sometimes, it is not a single legal rule but multiple legal rules that work together in a given case to compound an injustice. *Blackwater v. Plint* provides an example of this.[[56]](#endnote-56)The plaintiff Frederick Barney’s claims for emotional and physical abuse at his residential school were found to be statute-barred: the limitation period for them had run out. Only his claim for sexual abuse at the school was allowed to proceed, because the relevant statute placed no time limitations on lawsuits for sexual abuse. The trial judge noted that, in calculating the damages for which the defendants were responsible, he was bound to apply the crumbling skull rule, according to which the defendant is not responsible for any damage that is done to the plaintiff independently of the defendant’s actions. The trial judge then noted that the statute-barred physical and emotional abuse sustained at the school, along with the extreme poverty and deprivation in the plaintiff’s home prior to his attendance at the school, left him in an already damaged condition that was not the defendant’s responsibility and that needed to be deducted from his damage award.[[57]](#endnote-57) The Supreme Court, on appeal, upheld the trial judge’s ruling on these matters.

Many scholars found this decision troubling. But they have struggled to explain why. The relevant legal rules --the limitation rules and the crumbling skull rule-- are neutral rules that the court applied in a neutral way. Kent Roach has claimed that the problem here was that the plaintiff was “revictimized for being Aboriginal.”[[58]](#endnote-58) There is something intuitively right about this characterization, but it too does not really explain the problem: how could he have been revictimized by neutral legal rules that were neutrally applied? One explanation is that, when these legal rules were applied against the backdrop of systemic discrimination against Indigenous peoples, the legal rules ended up compounding the prior injustices that the plaintiff had suffered. The crumbling skull rule required the judge to reduce the plaintiff’s damages by an amount that represented his past injuries. But those past injuries –the emotional and physical abuse at the school, and the deprivation at home-- were themselves the result of injustices: namely, the systemic discrimination that the plaintiff’s family suffered from because they were Indigenous and that the plaintiff himself suffered at the residential school. So the combination of the crumbling skull rule and the limitations rule required the judge to take facts that would not have been true of the plaintiff, had he not been a victim of prior injustices (facts about the poverty of his home, facts about his emotional and physical abuse, and the fact that this abuse was statute-barred, which it would likely not have been had he not been so traumatized that he was unable to file a claim in a timely manner), and required the judge to use these facts as a reason for reducing the plaintiff’s damages. These legal rules thus compounded the prior injustices that he and his family had suffered and made the court complicitous in the continuation of those injustices.

I have suggested that there are four broad ways in which tort law contributes to social inequality: through inherently biased rules, through neutral rules interpreted in a biased way, through neutral rules that disproportionately disadvantage certain groups and thereby contribute to their unjust subordination, and through rules that compound a prior injustice. Those familiar with discrimination law will notice a pattern here. The rules that are inherently biased look and work somewhat like disparate treatment or direct discrimination. They directly distinguish between one person and others, in a way that disadvantages and devalues that person and the group to which they belong.[[59]](#endnote-59) The rules that are neutral but interpreted in a biased way look a little more like rules that have a disparate impact, in that they are facially neutral but work in practice to favour a certain privileged group. But instead of the problem here consisting primarily in the disproportionately disadvantageous effects of the rule, it is primarily a problem of stereotyping and privileging a certain perspective over others.[[60]](#endnote-60) Finally, the rules that disproportionately disadvantage certain marginalized social groups in ways that unfairly subordinate them, and the rules that compound an injustice that they have suffered, look very much like what disparate impact laws try to prohibit. I have argued elsewhere that part of the point of disparate impact laws is to protect against the unfair social subordination of marginalized social groups; and Deborah Hellman has argued that part of their purpose is to limit the compounding of prior injustices.[[61]](#endnote-61) So the classification that I have proposed here owes much to discrimination theory; though I have tried to present it as useful and illuminating on its own terms. In the next two sections of the paper, I shall try to show that this classification is also helpful in other ways –most immediately, in enabling us to see just how many theories of tort law might be comfortable with our revising legal rules that perpetuate social inequalities in one or more of these four ways.

**5.** ***Theories of Tort Law and Their Implications***

The fact that many of the rules of tort law perpetuate social inequalities in the ways that I have described is deeply troubling from a moral standpoint. And there is something additionally troubling about the fact that it is the *law* –which is supposed to be an instrument of justice— that is perpetuating these unjust inequalities. But it is surely not the job of every part of our legal system to be concerned with every type of injustice. Which, if any, of these rules of tort law is it really tort law’s responsibility to fix? And which sorts of public officials can legitimately fix them? One’s answers to these questions will depend very much on one’s view of the purpose and aims of tort law as a whole.

Tort theorists who write about the ways in which particular legal rules marginalize various social groups do not normally lay out a broader theory of tort law that would explain why these problems are properly thought of as tort law’s problems. This is understandable: each of these torts theorists focuses only on a particular doctrine within tort law, and it is simply not their project to build a theory of tort law as a whole. But if we are ultimately to defend the claim that public officials have a responsibility to revise such rules, we need to know which theories this aim is consistent with, and who can legitimately do the revising. I do not have the space in this paper to give a detailed analysis of each theory of tort law. But I do want in this section briefly to present number of prominent theories and to hazard a guess at their implications, with a view to suggesting that actually, these theories may leave more room for us to care about these inequalities than might at first appear.

Martha Chamallas has recently written an article bringing together many nuanced analyses of the ways in which tort law rules perpetuate certain inequalities, and she refers to them collectively as “social justice torts theory.” The analyses all start from the presumption that “one important goal of tort law must be to identify, address, and ameliorate the effects of . . . systemic inequalities and disparities.”[[62]](#endnote-62) But although Chamallas refers to this as a “theory,” it is, in its current form, not so much a theory as it is a statement of an important political goal. We still need a systematic account of tort law’s aims and features that could explain why this goal is properly thought of as tort law’s own goal*.* Chamallas states that this goal follows from the compensatory aim of tort law, because “to attain justice for the individual, systemic forms of injustice must be taken into account.” But this is too quick. We need an explanation of *why* justice for the individual, in whatever sense is relevant to tort law, can only be achieved through legal rules that do not perpetuate systemic inequalities. In asking for this explanation, I am not in any way contesting the general moral importance of eliminating such inequalities. I am simply noting that we need a more systematic account of why it is tort law’s job not to perpetuate them, or, more strongly, to work to rectify them.

What do more established theories of tort law have to say about this? Which of the four kinds of problems that I outlined above would other theorists of tort law think that tort law ought to rectify? Let us first consider theories that treat tort law as a body of rules distinct from public law, aiming to restore the equal status of a plaintiff and a defendant in the face of a wrong done to the plaintiff by the defendant. These are all theories that have their origins in Kantian “corrective justice,” which is concerned purely with the formal equality of the plaintiff and the defendant and not with the broader social effects of the legal rules involved. So they may seem to be particularly unpromising candidates for an attempt to justify eliminating the kinds of rules that perpetuate social inequalities.

But this is where it helps to have grouped the rules within tort law that perpetuate social inequalities into our four different categories. For when we look at the rules in the first and the second category –that is, inherently biased rules and neutral rules that have been given a biased interpretation-- we can see immediately that even the most formalist of corrective justice theories imply that such rules are unjust *on tort law’s own terms.* According to such theories, the aim of tort law is to “correct” a wrong done by the defendant to the plaintiff and to restore the purely formal equality off the parties. But, as proponents of these theories have acknowledged, a plaintiff and a defendant cannot interact as formal equals if the perspective or the interests of one of them are privileged over those of the other. And that is just what occurs when a rule devalues the life or the perspective of one of the two parties because of the social group to which they belong, or when a legal rule is given a biased interpretation that privileges the perspective of one of the parties and relies upon negative stereotypes about the other. So, even according to corrective justice theories of tort law, the first two problems I identified in the last section –namely, inherently biased rules and rules that are neutral but interpreted in a way that privileges the perspectives of some at the expense of those of others--- are ones that it is tort law’s business to fix.

Hanoch Dagan and Avihay Dorfman’s “just relationships” theory of tort law is in some respects similar to corrective justice theories, holding that the rules of tort law make it possible for us to interact fairly with each other. But, in place of formal equality, they import into tort law certain liberal ideals of self-determination and “substantive equality,” a conception of equality that is concerned not just with people’s abstract status as persons but also with the resources, opportunities and powers that are actually at their disposal. Dagan and Dorfman argue that tort law must set fair terms of interaction between plaintiffs and defendants, seen as substantively equal, self-determining individuals –and this means that the rules of tort law must respect the two parties “as the persons they actually are” and must do so “without giving priority to one individual’s aims or perspectives over another.”[[63]](#endnote-63) Clearly, a legal rule cannot respect the defendant and the plaintiff as the people they actually are if it devalues one of them because of their race or gender, or if it favours the perspective or the needs of one, or subjects the other to negative stereotypes. So Dagan and Dorfman’s just relationships theory, too, would hold that tort law can and must be concerned with revising both biased rules and neutral rules that have been interpreted in biased ways.

A third theory related to corrective justice is John Goldberg and Benjamin Zipursky’s “civil recourse theory.” It conceives of tort law as a means of ensuring that someone who has been wronged can “hold a wrongdoer answerable to her.”[[64]](#endnote-64) Goldberg and Zipursky propose that what underlies tort theory is fundamentally “an idea of equal rights.”[[65]](#endnote-65) Like Dagan and Dorfman, they seem to have a conception of substantive equality in mind, rather than a purely formal conception. So their view, too, would not only permit but also encourage revising legal rules that are biased or that have been given biased interpretations.

It is simply untrue, then, that this type of theory leaves no room for us to critique rules of tort law that perpetuate social inequalities. But what about rules that fall into my third and fourth categories –namely, rules that disproportionately disadvantage certain social groups and thereby contribute to their unjust subordination, or rules that compound a prior injustice? It might seem that these theories have a more difficult time explaining why such rules are problematic. On strict corrective justice theories, the only type of equality that judges adjudicating tort law cases can consider is the formal equality of the parties. It is irrelevant what effects these rules have on people’s material situations or their social status, outside of the law. So it is not clear that, on such theories, judges could legitimately alter tort law rules simply because they contribute to the unfair social subordination of certain marginalized groups. Similarly, the fact that a particular practice compounds an injustice might appear, from the corrective justice perspective, simply to be irrelevant: if the injustice that is compounded is not the kind of injustice that tort law should be concerned about, then why is there any reason for a judge to care about it?

These worries may be well-founded. But even Kantian corrective justice theories recognize that legislaturesare quite properly concerned with questions of distributive justice. So even if the more formalist of corrective justice theories imply that judges cannot consider these problems in their development of the common law, the theories nevertheless seem consistent with legislatures making efforts to alter such rules by statute. Moreover, as I have noted, both Dagan and Dorfman, on the one hand, and Goldberg and Zipursky, on the other, have deliberately tried to build substantive equality into their theories, in ways that I think give their theories even greater potential to advocate for changes made by judges to common law rules of these third and fourth types. As mentioned above, Dagan and Dorfman explicitly depart from the traditional corrective justice ideal of formal equality. For them, the type of equality that tort law rules must respect is avowedly substantive: the parties must be treated as equals “as the persons they actually are.”[[66]](#endnote-66) So the fact that a certain legal rule disproportionately disadvantages one party and the group to which they belong, and the fact that a certain legal rule compounds a prior distributive injustice done to one of the parties would, on their view, give even judges at least some reason to revise it (to be weighed against other reasons for retaining it). For Goldberg and Zipursky, private law as a whole needs to be understood within the overall context of public law. Tort law is for them one of the ways through which a government discharges an important duty towards its citizens –namely, its duty to provide a means through which civil wrongs can be redressed.[[67]](#endnote-67) Precisely because private law, on this view, is developed by the state in fulfillment of one of its public duties, it follows that public officials –whether legislators or judges-- are bound to develop private law doctrines in ways that are consistent with public law values, such as equal respect for the needs and the dignity of all. Permitting laws to remain in place that perpetuate pervasive social inequalities, and permitting laws that compound prior distributive injustices, is arguably not consistent with these public law values.

I have been considering one set of tort law theories, which might at first seem hostile to the enterprise of amending rules of tort law that perpetuate social inequalities, but which, on closer inspection, seem more amenable to it. What about those theories that do not distinguish between public or regulatory regimes, on the one hand, and private law, on the other, but see tort law as just another instrument of public regulation? As long as such a theory can incorporate the promotion of equality as one such relevant goal of tort law, such theories would leave at least some room for altering legal rules that perpetuate the marginalization of such social groups. But what about economic approaches to tort law, which care primarily about locating the legal rules that will maximize economic efficiency? There is surely no guarantee that the rules that result in the most economically efficient outcomes (however one defines this) will not be inherently biased or susceptible to biased interpretations, nor that they will never unfairly subordinate minority groups or compound past injustices.

Scholars of law and economics have sometimes argued, with respect to particular rules of tort law, that the most efficient outcome is sometimes the one that is most just, from the standpoint of marginalized social groups. For instance, Catherine Sharkey has argued that it is bothmore economically efficient and more just to replace gender- and race- based damage assessments in tort law with a “value of statistical life” methodology that incorporates a more individualized assessment and does not replicate systemic inequalities.[[68]](#endnote-68) But this seems to be a happy coincidence in this particular case, rather than an enduring commitment of economic theory. Moreover, other economists have pointed out that when certainstatically efficient rules are repeatedly applied over time, this can lead to outcomes that are increasingly adverse to poor and marginalized social groups.[[69]](#endnote-69) So efficient policy-making can sometimes over time end up exacerbating social inequalities.

We should not, therefore, understate the tension between pushing for recognition and rectification of inequalities, on the one hand, and achieving the goals of tort law on an economic approach, on the other. However, I wonder whether, even on an economic approach, there is not some pressure at some point to alter inequality-producing rules –particularly when we conceptualize tort law as one small part of a system of just legal regulation. Even on an instrumental model, tort law cannot be seen as an isolated instrument like a knife, one that could be valorized simply for its ability to cut things efficiently. Tort law is one part of a broader legal system that, as a whole, aims not simply at efficient regulation but at efficient *just* regulation. Might there therefore be systemic reasons of justice that could, on an economic approach to law, sometimes properly override tort law’s goal of achieving economic efficiency? It seems to me that this must be true; though much more work would need to be done to explain when and how such reasons of justice might restrict the pursuit of economic efficiency.

*6. Conclusion: Benefits of a General Classification*

I have tried to show that one benefit of the kind of general classification that I provided in Section 4 is that it better enables us to see which inequalities it is tort law’s responsibility to rectify on particular theories of tort law, and it enables us to notice that many established theories of tort law are in fact friendlier to the enterprise of working to eliminate such inequalities than might at first appear. But there are also other benefits to having such a general classification of the ways in which particular rules of tort law perpetuate social inequalities.

First, it can encourage scholars working from the standpoint of different interest groups to collaborate, whether on research projects, or in litigation, or in forums such as the Tort Law & Social Equality Project.[[70]](#endnote-70) They can see the problems that their particular social group is confronting as instances of a broader problem faced also by other groups, and can learn from those other groups both about the nature of the problems and about possible solutions. Torts scholars working on race- and gender-based damages tables have already worked together in such ways. And those working on issues relating to disability and queer theory are beginning to collaborate. As Doron Dorfman has recently noted, there are many concepts “that cross over from discourse related to queer individuals to discussions about the disability community,” such as the importance of pride and questions about when one comes out.[[71]](#endnote-71) Doron also notes that these two communities are often caught in a similar dilemma, between presenting their identity as they really experience it, as a source of joy and fulfillment, and needing to hide it or needing to present it as a source of injury in order to succeed in tort litigation.

Second, there is a danger that, if each marginalized social group focuses only on the very particular problems that seem to affect them without seeing their efforts as parts of a broader struggle for social equality, then some groups may end up advocating for legal rules that actually work to the detriment of *other* marginalized groups.[[72]](#endnote-72) A coordinated approach that is attentive to the impact of a given legal rule upon many marginalized social groups would often be helpful, in order to avoid undermining the efforts of other groups. One example of an area of tort law where conflict between marginalized social groups is a very real possibility are the wrongful birth torts. In deciding, for instance, whether a mother can owe a duty of care in negligence law to her born alive child for damage done to that child as a result of the mother’s negligence when it was still a foetus,[[73]](#endnote-73) or whether a doctor owes a duty of care both to his female patient of reproductive age and to any child subsequently born to her,[[74]](#endnote-74) courts need to consider both the position of women and the position of the children subsequently born with disabilities. Advocates for these two groups could profitably come together to explore the various ways in which alternative legal rules in such cases might perpetuate the unjust subordination of either group or might compound prior injustices, so that we can work towards a solution that both groups might find acceptable.

Looking for a general classification of the ways in which different rules of tort law marginalize different social groups can also help us think more systematically about what exactly is morally troubling about the perpetuation of inequality in each of these different cases; about whether they are all of equal moral urgency; and about what to do in cases where alternative possible legal rules might each raise different kinds of equality-based concerns. This is where a dialogue between torts scholars and discrimination theorists would be especially helpful.

Finally, I hope that the general classification I have given of ways in which tort law rules perpetuate the marginalization of certain social groups may be helpful to legal scholars working in areas other than tort law. For there are likely analogous problems with many other legal rules, both within private law and within public law. If we are truly to work at eliminating pervasive social inequalities, we need to think more deeply and more systematically, not just about how to craft anti-discrimination laws, but also about how to modify our other laws. Only then will we be able to lay down the necessary conditions for a true society of equals.

1. \*For helpful comments on earlier drafts of the paper, I am very grateful to Mohammad Fadel, Kevin Davis, Mark Geistfeld, John Goldberg, Tarunabh Khaitan, Karen Knop, Arthur Ripstein, Catherine Sharkey, Zoe Sinel, and Ernest Weinrib, and to the audience at the NYU Faculty Workshop.

   The quoted phrase is from Justice Kennedy’s majority opinion in *Texas Dep’t of Housing and Community Affairs v. Inclusive Communities* *Project,* 576 U.S. 519 (2015) at 2522. [↑](#endnote-ref-1)
2. Joseph Fishkin, *Bottlenecks: A New Theory of Equality of Opportunity* (Oxford University Press, 2013)*;* Schlomi Segall, *Equality and Opportunity*, Oxford University Press, 2013. [↑](#endnote-ref-2)
3. Sophia Moreau, *Faces of Inequality,* Oxford University Press, 2020; Niko Kolodny, *The Pecking Order* (Harvard University Press, forthcoming in 2023). [↑](#endnote-ref-3)
4. Kasper Lippert-Rasmussen, *Born Free and Equal* (New York: Oxford University Press, 2014);Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2016)*.* [↑](#endnote-ref-4)
5. See Moreau, *supra* note 3 and Kolodny, *supra* note 3. Michael Sandel calls this “equality of condition” in *The Tyranny of Merit* (Macmillan, 2020). Although many discrimination theorists think we ought to aim for a society of equals, Khaitan and Lippert-Rasmussen (*supra* note 4) have claimed that we ought to aim only to give priority to the worst off or to enable everyone to reach some level of *sufficiency*. This disagreement between egalitarians, on the one hand, and prioritarians or sufficientarians, on the other, is not important for the purposes of my paper. That is because those who think equality matters in this context do not endorse equality in a sense that permits levelling down, and which would be inconsistent with giving priority to the worse off and with enabling all to reach some level of sufficiency. On the contrary, the ideal of a society of equals is precisely an ideal of a society in which everyone is treated with dignity and raised to some level of sufficiency in addition to having an equal status to that of others. So, regardless of whether one appeals to a society of equals or to priority or sufficiency, one will think that we ought to work to end the marginalization of certain social groups and to ameliorate their condition by giving them certain important opportunities, resources, and powers had by other social groups. [↑](#endnote-ref-5)
6. By “the discipline,” I mean the relatively young discipline of discrimination theory, understood as a branch of legal philosophy focussing on why discrimination is morally troubling and how the law can best address whatever moral problems it raises. See the works cited in notes 2-4 and 7- 9 for key texts in this literature. [↑](#endnote-ref-6)
7. See Khaitan, *supra* note 4, as well as Deborah Hellman, *When is Discrimination Wrong?* (Harvard UP, 2008) and Benjamin Eidelson, *Discrimination and Disrespect* (Oxford UP, 2015). Though for an exception see the work of Sandra Fredman, especially “Challenging the Frontiers of Gender Equality: Women at Work,” forthcoming in *Frontiers of Gender Equality,* ed. Rebecca Cook (U Penn Press, 2023). [↑](#endnote-ref-7)
8. From an early draft of “Discrimination: The Good, the Bad and the Wrongful,” presented at the University of Toronto Faculty of Law in 2018; a subsequent draft was published in *Proceedings of the Aristotelian Society* 118.1 (2018) 55-81. [↑](#endnote-ref-8)
9. See, in addition to those cited above, the articles in Kasper Lippert-Rasmussen, ed, *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2018). [↑](#endnote-ref-9)
10. See, for example, the articles in Deborah Hellman and Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (OUP, 2013); Owen Fiss, “Groups and the Equal Protection Clause,” 5.2 *Philosophy & Public Affairs* (1976): 107-177; Cass Sunstein, “The Anti-Caste Principle,” 92 *Mich. L. Rev.* (1994): 2410-2455; and Khaitan, *supra* note 4. [↑](#endnote-ref-10)
11. As it was in *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658 (2009). See also Richard Primus, “The Future of Disparate Impact” (2010) 108:8 Mich. L. Rev. 1341. [↑](#endnote-ref-11)
12. See the Quebec *Charte des droits et libertés de la personne,* *CQLR, c C-12*. For Canada’s constitutional protection of affirmative action, see the *Canadian Charter of Rights and Freedoms*, s.15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For prohibitions on disparate impact, see the Canadian provincial human rights codes, such as the *Ontario Human Rights Code,* R.S.O. 1990, c. H.19, s.11. For Canada’s constitutional protection of affirmative action, see the *Charter of Rights and Freedoms,* s.15(2). For prohibitions on disparate impact, see our provincial human rights codes, such as the *Ontario Human Rights Code,* R.S.O. 1990, c. H.19, s.11. [↑](#endnote-ref-12)
13. For an influential critique, see Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press, 1992) and “Standing Firm, on Forbidden Grounds,” 31 *San Diego L. Rev.* 1 (1994). [↑](#endnote-ref-13)
14. See Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), ch. 13 (on the impact on women of constitutional protections for freedom of speech); Reva Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection” (1992) 44:2 *Stan. L. Rev*. 261 at 336-347 (on the impact on women of employment law and child welfare laws); Robert Wintemute, “Sexual Orientation and the *Charter*: The Achievement of Formal Legal Equality (1985-2005) and Its Limits” (2004) 49:4 *McGill L.J.* 1143 at 1148-1173 (on the impact on same-sex couples of criminal law, employment law, and family law). [↑](#endnote-ref-14)
15. For example, Tobin Siebers, *Disability Theory* (Ann Arbor: University of Michigan Press, 2008); and the papers in Colin Barnes & G. Mercer, eds. *Implementing the Social Model of Disability: Theory and Research* (Leeds: Disability Press, 2004). [↑](#endnote-ref-15)
16. See Stefan Gossling, “Urban Transport Justice” (2016) 54 J. Transp. Geogr. 1; Saeid N. Adli & Subeh Chowdhury. "A Critical Review of Social Justice Theories in Public Transit Planning" (2021) 13:8 Sustainability 4289. [↑](#endnote-ref-16)
17. For example, Negar Omidakhsh, Aleta Sprague, & Jody Heymann, “Dismantling Restrictive Gender Norms: Can Better Designed Paternal Leave Policies Help?” (2020) 20:1 *Anal. Soc. Issues Public Policy* 382; Jenny Alsarve, Katarina Boye, & Christine Roman, “Realized plans or revised dreams? Swedish parents' experiences of care, parental leave and paid work after childbirth” in Daniela Grunow & Marie Evertsson, eds, *New Parents in Europe: Work-Care Practices, Gender Norms and Family Policies,* (Edward Elgar Pub., 2019) 68; Statistics Canada, “Family matters: Parental Leave in Canada” in *The Daily*, Catalogue No. 11-001-X (Ottawa: Statistics Canada, 2021). [↑](#endnote-ref-17)
18. Sandra Fredman, supra note 7; Gina Schouten, *Liberalism, Neutrality, and the Gendered Division of Labor* (Oxford University Press, 2019). [↑](#endnote-ref-18)
19. Martha Chamallas often positions her and others’ social justice focussed work in opposition to standard theories of tort law (such as formalist theories and economic theories): her work is part of “social justice tort theory,” she suggests, whereas theirs is not. But I shall suggest that in fact, these theories leave more room than one might initially suppose for efforts to alter the rules of tort law so as to promote equality. See “Social Justice Tort Theory,” 14.2 *Journal of Tort Law* (2021). [↑](#endnote-ref-19)
20. For some foundational work, see Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012); Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016);John Gardner, “What is Tort Law For? Part I. The Place of Corrective Justice” *Law and Philosophy* 30 (2011), 1. [↑](#endnote-ref-20)
21. For some foundational work, see R. H. Coase, “The Problem of Social Cost,” 3 *J. L. & Econ* (1960); William A. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Harv. Univ. Press, 1987); Richard A. Posner, *Economic Analysis of Law*, (Boston: Little Brown, 1973) and Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale Univ. Press, 1970). [↑](#endnote-ref-21)
22. See, for instance, Chamallas, *supra* note 19; Martha Chamallas and Jennifer Wriggins, *The Measure of Injury* (NYU Press, 2010), and Anita Allen, “Privacy Torts: Unreliable Remedies for LGBT Plaintiffs” 98.6 California Law Review (2010) 1711. [↑](#endnote-ref-22)
23. Mayo Moran, *Rethinking the Reasonable Person* (Oxford UP, 2003); Craig Purshouse and Ilias Trispiotis, “Is Conversion Therapy Tortious?” 42 *Legal Studies* (2022), 23–41 at 35. Adam A. Milani, “Living in the World: A New Look at the Disabled in the Law of Torts,” 48.2 *Catholic University Law Review* (1999) 323, at 341-6. [↑](#endnote-ref-23)
24. For example, Catherine M. Sharkey, “Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages,” 96 *Notre Dame Law Rev.* (2021) 1479; Kimberly A. Yuracko & Ronen Avraham, “Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,” 106 *Calif. Law* *Rev.* (2018) 325. [↑](#endnote-ref-24)
25. Kent Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools”, 64(4) *University of Toronto Law Journal* (2014): 566-595. [↑](#endnote-ref-25)
26. Some exceptional groundwork has been done by Martha Chamallas and Jennifer Wriggins (*supra* notes 19 and 22) to bring together social justice-focussed analyses of tort law. But as I argue later in Section 5 of this paper, “social justice torts theory” still lacks a theoretical foundation, so is really not yet itself a “theory” –though its important insights certainly deserve one. Similarly, although Avraham and Yuracko have argued that tort law’s approach to remedial damages is discriminatory based on race and gender, they do not appeal to discrimination theory or try to analyze this as part of a more general problem with tort law. See “Torts and Discrimination,” 78.3 *Ohio State Law Journal* (2017) 661-731. [↑](#endnote-ref-26)
27. See, for instance, *Ivory v International Bus. Machines Corp*., 37 Misc. 3d 1221(A) (N.Y. Sup. Ct. November 15, 2012); *Abbo-Bradley v. City of Niagara Falls*, 2013 U.S. Dist. LEXIS 119413 (W.D.N.Y. August 21, 2013). [↑](#endnote-ref-27)
28. For the most recent Supreme Court pronouncement on the doctrine, see *Pearson v Callaghan*, 555 U.S. 223. [↑](#endnote-ref-28)
29. *Das v. George Weston Limited*, 2018 ONCA 1053. [↑](#endnote-ref-29)
30. Though for one exception, see California’s Civil Code, which has since 2003 recognized a tort of domestic violence: [Civil Code § 1708.6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1708.6&originatingDoc=Ibc818c4aab3311dbab489133ffb377e0&refType=SP&originationContext=document&transitionType=DocumentItem&ppcid=c6c566772545415db0a36c0aaa1e5dac&contextData=(sc.Search)#co_pp_8b3b0000958a4). [↑](#endnote-ref-30)
31. See Fiona Kelly, “Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort” 44 *Supreme Court Law Review* (2009) 321-41. [↑](#endnote-ref-31)
32. Though for two exceptions, see the recent amendments passed in New York and California, requiring courts to consider domestic violence when dividing assets and awarding spousal support: New York Domestic Relations Law §236B(5)(d)(14) and California Fam Code § 4320(i). [↑](#endnote-ref-32)
33. See Justice Renu Mandhane’s judgment in [*Ahluwalia v. Ahluwalia*](https://canlii.ca/t/jmpnf), 2022 ONSC 1303. Prior to her judicial appointment, Justice Mandhane was the Chief Commissioner of the Ontario Human Rights Commission – and so she was very much aware of the social inequalities that underlie both the circumstances of domestic violence and the absence of this tort in tort law. [↑](#endnote-ref-33)
34. *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181 at 195. Subsequently, in the Supreme Court case of *Honda Canada Inc. v. Keays,* [2008] 2 SCR 362, Justice LeBel stated that Bhadauria decision “went further than was strictly necessary” and that “the development of tort law ought not to be frozen forever on the basis of this *obiter dictum*.” This was heralded at the time as opening the door to future recognition of a tort of discrimination; but to date, no such litigation has been successful. [↑](#endnote-ref-34)
35. John I. Laskin, “Proceedings under the Ontario *Human Rights Code*” (1980) 2:3 Advoc. Q. 280 at 299-302; R. Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (University of Toronto Press, 2000) at 54-55. [↑](#endnote-ref-35)
36. For discussion of whether there should be a tort of discrimination and arguments in favour of recognizing a tort of negligent racial discrimination, see Rakhi Ruparelia, “I Didn’t Mean It That Way,” Racial Discrimination as Negligence, 44:2d *Supreme Court Law Review* (2009) 81 and Sophia Moreau, “Discrimination as Negligence,” (2012) *Canadian Journal of Philosophy*, Supplementary Volume 36: Justice and Equality, ed. Colin MacLeod, 123-150. [↑](#endnote-ref-36)
37. Leslie Bender “A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 *J Legal Educ* 3 at 32; Wendy Parker “The Reasonable Person: a Gendered Concept” (1993)23:2 *Vic. Univ. Wellingt. Law Rev* 105; and Robyn Martin, “A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury” (1994) 23 *Anglo-Amer L Rev* 334 at 342–345. [↑](#endnote-ref-37)
38. See the analysis of *McHale v Watson* [1966] HCA 13 by Mayo Moran in *Rethinking the Reasonable Person, supra* note 23. [↑](#endnote-ref-38)
39. Craig Purshouse and Ilias Trispiotis, “Is Conversion Therapy Tortious?” supra note 23 at 35. [↑](#endnote-ref-39)
40. Adam A. Milani, “Living in the World: A New Look at the Disabled in the Law of Torts,” supra note 23 at 341-6. [↑](#endnote-ref-40)
41. *Cook v. City of Winston-Salem* 85 S.E.2d 696 (N.C. 1955) at 702. [↑](#endnote-ref-41)
42. *Saadati v. Moorhead*, 2017 SCC 28 [↑](#endnote-ref-42)
43. *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27 at para 8. [↑](#endnote-ref-43)
44. Ibid, at para 9 and para 15. [↑](#endnote-ref-44)
45. *Jane Doe 72511 v. M. (N.)*, 2018 ONSC 6607; followed in *VMY v. SHG*, 2019 ONSC and cited in *ES v Shillongton*, 2021 ABQB 739 (recognizing the tort in Alberta). [↑](#endnote-ref-45)
46. Anita L. Allen, “Privacy Torts: Unreliable Remedies for LGBT Plaintiffs” 98.6 California Law Review (2010) 1711. [↑](#endnote-ref-46)
47. Anita Allen, *ibid;* Clay Calvert, Ashton Hampton and Austin Vining, “Defamation Per Se and Transgender Status: When Macro-Level Value Judgments About Equality Trump Micro-Level Reputational Injury” 85 Tennessee Law Review (2018) 1029. [↑](#endnote-ref-47)
48. See Sharkey, as well as Yurako & Avraham, both *supra* note 24. See also Goran Dominioni, “Biased Damages Awards: Gender and Race Discrimination in Tort Trials” (2018) 1:2 Int'l Comp., Policy & Ethics L. Rev. 269; Loren Goodman, “For What It’s Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards” (2017) 70 Vand. L. Rev. 1353; Elizabeth Adjin-Tettey, “Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies” (2004) 49 McGill L.J. 309, 311; Martha Chamallas, “Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument” (1994) 63 Fordham L. Rev. 73, 81-82. [↑](#endnote-ref-48)
49. *Blackwater v. Plint*, 2001 BCSC 997, at para 525. [↑](#endnote-ref-49)
50. Anne Bloom & Paul Steven Miller, “Blindsight: How We See Disabilities in Tort Litigation,” 86 *Wash. L. Rev.* 709 (2011) at 727-32, 743; discussed by Chamallas in “Social Justice Tort Theory” supra note 19 at 5-6. [↑](#endnote-ref-50)
51. For important recent philosophical work on what it is for a discriminatory rule to devalue someone, see Hellman and Eidelson, *supra* note 7. Within tort theory, Chamallas has used the term “bias” much more broadly, to denote *any* rule that has unjust effects, regardless of whether it deliberately singles out a particular group or devalues them. Though it is understandable that Chamallas would do this for rhetorical or political reasons, it is in my view analytically unhelpful, because it elides important legal and moral distinctions between different ways of treating a group unequally. See Chamallas, “The Architecture of Bias: Deep Structures in Tort Law,” 146 *U. Pa. L. Rev.* (1998) 463. [↑](#endnote-ref-51)
52. Some might argue that the law’s different treatment of psychiatric harm need not reflect any bias against psychiatric injuries or the agents that suffer them. Rather, one always has a choice over to how to respond to a particular psychiatric injury, whereas in the case of merely physical injuries, there is no room for choice or agency; hence, there is a legitimate basis for distinguishing between psychiatric and physical injuries and holding the former to a higher bar. But this argument seems untenable. Many mental illnesses leave little room for choice; and many physical injuries *do* vary in their duration and severity in part *because of* choices that the agent makes. So although there might be reason to distinguish between illnesses exacerbated by our chosen actions and those not, there is no reason to think this division will neatly line up with the division between psychiatric harms and physical ones. [↑](#endnote-ref-52)
53. See Moreau, “Unfair Subordination,” Chapter 2 of *Faces of Inequality*, supra note 3. [↑](#endnote-ref-53)
54. Avraham & Yuracko, “Torts and Discrimination,” supra note 26 and “Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,” supra note 24. [↑](#endnote-ref-54)
55. Deborah Hellman, “Indirect Discrimination and the Duty to Avoid Compounding Injustice,” Chapter 5 of *Foundations of Indirect Discrimination Law,* eds. Hugh Collins and Tarunabh Khaitan (Hart, 2018) 105-122. See also Benjamin Eidelson, “Patterned Inequality, Compounding Injustice and Algorithmic Prediction,” *American Journal of Law and Equality* (2021) 1: 252–276. [↑](#endnote-ref-55)
56. See the trial judgment, *supra* note 49; the British Columbia Court of Appealjudgment, *Blackwater v. Plint* (2003), 21 B.C.L.R. (4th) 1, and the judgment of the Canadian Supreme Court: *Blackwater v. Plint,* [2005] 3 SCR 3. [↑](#endnote-ref-56)
57. *Blackwater v Plint, supra* note 49, at paras 362-63 and paras 517-24. [↑](#endnote-ref-57)
58. Roach, *supra* note 21. [↑](#endnote-ref-58)
59. Eidelson, *Discrimination and Disrespect*, *supra* note 8 at 16-26; Frej Klem Thomsen, “Direct Discrimination” in Kasper Lippert-Rasmussen, ed., *The Routledge Handbook of the Ethics of Discrimination* (New York, N.Y.: Routledge, 2018), 19. [↑](#endnote-ref-59)
60. Hugh Collins & Tarunabh Khaitan, “Indirect Discrimination Law: Controversies and Critical Questions” in Hugh Collins & Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (Oxford, U.K.: Hart, 2018); see also Moreau, *Faces of Inequality*, supra note 3, Chapter 2. [↑](#endnote-ref-60)
61. Moreau, *Faces of Inequality, supra* note 3; Hellman, *When is Discrimination Wrong?* supra note 8. [↑](#endnote-ref-61)
62. Chamallas, “Social Justice Tort Theory,” supra note 19 at 6. [↑](#endnote-ref-62)
63. Hanoch Dagan & Avihay Dorfman, “Just Relationships” (2016) 116 Colum. L. Rev. 1395; Hanoch Dagan & Avihay Dorfman, “Substantive Remedies” (2020) 95 Notre Dame L. Rev. 513.   [↑](#endnote-ref-63)
64. John C.P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Harvard UP, 2020) at 69. [↑](#endnote-ref-64)
65. Ibid, 73. [↑](#endnote-ref-65)
66. Dagan and Dorfman, “Just Relationships” supra note 63 at 1424. [↑](#endnote-ref-66)
67. See esp. Chapter 4, “The Principle of Civil Recourse,” *Recognizing Wrongs, supra* note 64. [↑](#endnote-ref-67)
68. Sharkey, *supra* note 24. [↑](#endnote-ref-68)
69. Daniel Giraldo Paez and Zachary Liscow have identified this effect, and call it “policy snowballing”: see Paez and Liscow, “Inequality Snowballing,” version of 8 July 2022, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4157437>. [↑](#endnote-ref-69)
70. See The Tort Law & Social Equality Project: [www.tortlawandsocialequality.ca](http://www.tortlawandsocialequality.ca). [↑](#endnote-ref-70)
71. Doron Dorfman, “Post” in “April Discussion Forum: Hurdles for LGBTQ+ Plaintiffs and Plaintiffs with Disabilities,” Tort Law & Social Equality Project: <https://forum.tortlawandsocialequality.ca/t/april-discussion-forum-hurdles-for-lgbtq2-plaintiffs-and-plaintiffs-with-disabilities/45> [↑](#endnote-ref-71)
72. For instance, Kimberle Crenshaw has pointed out some of the ways in which mainstream feminist causes and arguments tacitly presuppose that all women’s circumstances are like privileged white women’s circumstances, and this thereby renders invisible many of the social realities that Black women confront. See, for example, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” 1989 *University of Chicago Legal Forum* 139. [↑](#endnote-ref-72)
73. *Dobson v Dobson*, [1999] 2 SCR 753 [↑](#endnote-ref-73)
74. *Paxton v Ramji,* 2008 ONCA 697, 92 OR (3d) 401. [↑](#endnote-ref-74)